SUPREME COURT, U.S.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1952

No. 205

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and the CALIFORNIA ELECTRIC POWER COMPANY,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA.

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by the two customers for boiler purposes was subject solely to State regulation. The Court said (syl. 3):

> "Nothing need be added to this clear statement of the coverage of the act. When applied to the problem before us it means that the power of the Commission to regulate the sale of natural gas by Colorado Interstate extends only to sales to buyers for resale and not to sales to buyers for their own consumption. That being the extent of the authority which Congress has conferred upon the Commission that body is without authority to compel Colorado Interstate to make its gas tariff applicable to any sales other than those for resale. It is beyond the power of the Commission to require a natural gas company within its jurisdiction to make its tariff applicable to sales which are not within the regulatory powers of the Commission for this would be in effect to regulate such sales. Indeed the Commission itself recognized this in 1945 when in accepting Colorado Interstate's earlier tariff changes for filing it specified that they were to be effective only for sales 'for resale for ultimate public consumption.' It necessarily follows that the applicability clauses of Colorado Interstate's FPC Gas Tariff, Original Volume No. 1, which the Commission disallowed should have been allowed since they did no more than limit the applicability of the tariff to those sales which were within the Commission's regulatory jurisdiction."

Hence, if all other points in this case were decided for Navy, the most that California Commission could be required to surrender would be jurisdiction over rates ap-

plicable to *energy resold by Navy*, and said California Commission would retain jurisdiction over rates for that major portion of the energy which the undisputed evidence shows is consumed by Navy.

There can be no mechanical difficulties in connection with measuring the several parts, for the Findings made by FPC [R. 37] show that the respective amounts of energy consumed by Navy's machinery, etc., and that furnished employees and claimed to be resold has, for some years, been metered to a fraction of one per cent. Indeed, no commodity of comerce can be measured with such accuracy as electricity, and electric devices are the instruments by which the most accurate measurements of other things are made.

As in *Colorado Interstate Gas Co.* (*supra*), it is not necessary for this Court to decide whether or not any past or existing conditions or transactions at Hawthorne Ammunition Depot constitute resale of energy in interstate commerce subject to regulation under Part II of the Act. Indeed, it would be quite useless to do so, first, because past conditions may not continue, and, secondly, because in the future, new conditions or practices may exist which have not existed in the past. The most that the Company can be required to do under any circumstances would be to file a schedule with FPC applicable to any energy sold to Navy for resale in interstate commerce. If such occurs, the schedule covers it; if such does not occur the schedule is inoperative.

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(e) Company's Sales to Navy Are Merely Part of Company's Distribution Service in Mono County, California, and as Such Are Exempt From Regulation Under Part II.

A distribution system need not be a *typical* distribution system. Company's distribution system and business in Mono County are certainly not *typical* of larger centers of population such as cities or even closely built rural areas. Mono County is a remote, mountainous county, with an average elevation of more than 7,000 feet above sea level, a very sparse population, and little industry, except mining and cattle grazing. Power Company distributes electric energy to the public in said County where and to the extent demanded, but it cannot create power demands or multiply customers beyond the capacity of the County's population and economy. Power Company's facilities at and about the Mill Creek Plant, including the 55 kv line extending from Mill Creek to Leevining substation are used principally for the distribution of power in that locality, including the Navy's purchases for use in its Ammunition Depot.

There is no generally recognized standard of distinction between the transmission and the distribution of electric energy, either engineeringly or legally, and, if facilities are used at all in local distribution, that ends the matter so far as FPC jurisdiction is concerned, even though they are also used for transmission.

Connecticut L. & P. Co. v. Fed. Power Com. (*supra*).

Section 201(b) exempts facilities used in local distribution, but does not require that they be used exclusively for that purpose. If they are used for local distribution

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at all, they are exempt. The situation is analogous to that in *Jersey Central P. & L. Co. v. Fed. Power Com.* (*supra*), where it was held that, since the transmission of electric energy in interstate commerce constituted the Company a public utility under the Act, and since Congress had not specified any percentage no matter how small that might be disregarded, therefore, the transmission of any energy whatever in interstate commerce, even unintentionally, was sufficient to include that Company. So here, since Congress has not specified any amount or proportion of distribution that must be carried on to constitute "use in distribution," any distribution at all is sufficient to exempt facilities from FPC jurisdiction. Since the facilities are used in distribution, the energy sold therefrom is sold in distribution and is purely intrastate commerce.

Conclusion.

Navy asks this Court, in effect, to get around no less than six major obstacles, to say nothing of several lesser ones, in order to decide this case for Petitioner.

1. There is the obstacle provided by Sections 19 and 20, that, under present conditions, regulation rests with a state or states, and not with FPC.

2. There is the obstacle that Company is not engaged in interstate commerce so far as its own lines are concerned and can only be engaged in interstate commerce by reason of Navy's transmission if Navy is engaged in interstate commerce, which Navy is not, either constitutionally or by reason of statutory definition.

3. There is the obstacle that Company's sales of electric energy are not sales to a person and, therefore, cannot be within the Act.

4. There is the obstacle that Company's sales to Navy are not for resale, but are and were always understood to be for the operation of the Ammunition Depot.

5. There is the obstacle that, even if Company is selling Navy energy for resale in interstate commerce, such constitutes only a minor part of the whole, and the larger remainder is clearly subject to state regulation.

6. There is the obstacle that Company's service to Navy is not typically a transmission service, since the Company sells and delivers the energy at Mill Creek, the principal transmission being performed by Navy, and, therefore, Company's service resembles the distribution service to its consumers in the same locality in Mono County and is a part of its local distribution, exempt from Part II of the Act.

Respectfully submitted,

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APPENDIX.

Rate Regulation Provision of Licenses.

Article 23 of Licenses for Projects 1388 and 1390, Article 25 of Project 1389, and Article 28 of Project 1394.

* * * * * * * * * *

"The licensee shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged; and in case of the development, transmission, distribution, sale, or use of power in public service by the Licensee or by its customers engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by the Licensee or by its customers engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of this license that jurisdiction is hereby conferred upon the Commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control; provided, that the jurisdiction of the Commission shall cease and determine as to each specific matter of regulation and control prescribed in this article as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter."

Service of the within and receipt of a copy thereof is hereby admitted this.....day of December, A. D. 1952.

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agreement of the two commissions, a concurrent hearing was held to explore the jurisdictional question (R. 7). Subsequently, each commission rendered its opinion, each finding that it, rather than the other commission, had jurisdiction (California Commission Decision No. 45913, issued July 3, 1951 (R. 6-19); Federal Commission Opinion No. 212, issued April 13, 1951 (R. 24)). The Federal Commission opinion had been preceded by a federal hearing examiner's decision which coincided with the California Commission's views and denied Federal Commission jurisdiction (No. 495, this Term, Tr. of Record 13-52).

The California Commission Decision No. 45913 was made the subject of petition for writ of review filed by the United States (Navy) before the California Supreme Court. That Court's action denying review (R. 68) constituted a determination upon the merits.

California Public Utilities Code, Sections 1756-1760 (Cal. Stats. 1951, ch. 764; formerly Public Utilities Act, Section 67)

Napa Valley Electric Co. v. Railroad Commission, 251 U.S. 366, 371-373 (1920)

Southern California Edison Co. v. Railroad Commission, 6 Cal. 2d 737, 747 (1936).

Subsequently, the California Supreme Court denied rehearing (R. 74) and the cause was then brought here upon writ of certiorari.

The Federal Commission Opinion No. 212, on the other hand, was made the subject of review before the Court of Appeals for the Ninth Circuit. That

Court affirmed the Federal Commission's opinion (*California Electric Power Co. v. Federal Power Commission*, 9th Cir., No. 12987, decided October 14, 1952). Petition for writ of certiorari is now pending before this Court (this Term, No. 495).

The California Commission, in its decision here challenged, concluded that it had jurisdiction over the sales by California Electric Power Company to the Navy and that its earlier general rate increase decision should be construed to apply to such sales, but it did not order the Company to charge certain rates; it merely *authorized* the Company to charge the rates in a certain Schedule P-2 designed for wholesale sales (R. 19). The reason for authorizing rather than directing the imposition of specific rates lay in the fact that, pursuant to Public Utilities Code, Section 532, the Commission had, in 1942, issued a general order (General Order No. 96), providing in Section X-B thereof that an electric utility could, if it saw fit, furnish service to the United States and its departments at "free or reduced rates." The effect of the Commission's decision was thus merely to place a ceiling on the rate which the Company could charge the Navy, leaving the parties free to negotiate for any lesser figure (R. 12).[1]

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[1] In the foregoing statement, reference has been made not only to the transcript of record before this Court in this proceeding but also to the transcript of record before this Court in the cognate proceeding No. 495, this Term, (respecting which petition for writ of certiorari is pending). While we would have questioned the propriety of such course, petitioner United States has followed it in its brief. (e.g. Gov. Brief 5 n); and, since there is no dispute re-

SUMMARY OF ARGUMENT.

Both Part I and Part II of the Federal Power Act must be considered in determining whether jurisdiction may properly be exercised by the California Commission over the sales to the Navy. This Court has now made it clear, contrary to the repeated contentions of the Federal Power Commission, that Part II, enacted in 1935, did not repeal by implication the Federal Water Power Act of 1920, incorporated as Part I of the Federal Power Act in 1935, so to place interstate wholesale sales of licensed power solely under Part II. The sales in *Pennsylvania Water Co. v. Federal Power Commission*, 343 U.S. 414 (1952), were interstate wholesale sales and therefore seemed to fall under Part II; they were also sales of licensed energy and therefore seemed to fall under Part I. This Court specifically declared the sales to be subject to *both* Part I and Part II. 343 U.S. at 419. Despite the disingenuous assertions of the Government in its brief here (Gov. Brief 16, 53) that the California Commission came to its conclusion upon an erroneous assumption that Part I alone is to be considered when licensed power is

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specting the facts, it is doubted whether any harm can come from the loose practice in which the Government apparently wishes to indulge. We do resent the comment in the Government's brief (Gov. Brief 5 n) that the California Public Utilities Commission "has declined to forward it [the record of the joint hearing before the California Commission and the Federal Commission (see *supra*, pp. 6, 7)] to this Court." The California Commission has no power to forward such record, the only record before the California Supreme Court having been the decision of the California Commission. Had the Government wanted the record of the joint hearing forwarded to this Court, it could have taken appropriate steps and, certainly, the California Commission would not have objected.

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conditions were met, viz., that the states directly concerned had qualified regulatory commissions and that such states were not shown unable to agree respecting the rates in question. Part I, Section 20. It follows that, whenever upon the facts of a given case the conditions to state jurisdiction provided in Section 20 are met, Section 201(a) operates to preclude Federal Power Commission jurisdiction under Part II, inasmuch as Section 201(a) declares that Federal Power Commission jurisdiction shall "extend only to those matters which are not subject to regulation by the States" 28

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B. Even if California and Nevada are both states "directly concerned", each has "provided a commission or other authority to enforce the requirements of this section [20] within such State".... 34

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On Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA.

OPINIONS BELOW.

The decision of the California Public Utilities Commission (R. 6-19) is reported at 50 Cal. P.U.C. 749. The order of the California Supreme Court denying a petition for writ of review is reported in 38 Adv. Cal. 323 (R. 68) and its order denying rehearing

is reported in 38 Adv. Cal. 484 (R. 74). Neither of such orders is accompanied by an opinion.

JURISDICTION.

The California Supreme Court denied a writ of review respecting the decision of the California Public Utilities Commission on January 21, 1952 (R. 68), and denied rehearing on February 18, 1952 (R. 74). The United States sought and obtained an order extending time for filing a petition for writ of certiorari to July 17, 1952 (order of Mr. Justice Douglas, dated April 17, 1952 (R. 75)). Petition for writ of certiorari was filed July 16, 1952 and was granted October 13, 1952 (R. 77). The jurisdiction of this Court rests upon 28 U.S.C. 1257(3).

QUESTIONS PRESENTED.

The ultimate question is whether the California Public Utilities Commission could, consistently with the Federal Power Act, grant to California Electric Power Company permissive authority to charge certain rates in selling electricity to the Navy in California, the Navy taking delivery in California and transmitting the energy over its own lines to Nevada for the use of its Ammunition Depot in that state.

More specifically, the principal questions are:

Whether under Part II of the Federal Power Act the Federal Power Commission can claim jurisdiction

over the sales to the Navy even though that Commission's jurisdiction over sales is limited to interstate sales "to any person for resale" and the Navy is not a "person" as defined "for purposes of this act" in Section 3(4), and the Navy, furthermore, is not engaged in the business of reselling energy but on the contrary utilizes a portion of the energy it purchases from California Electric Power Company for the needs of its tenants, at a charge.

Whether state regulation of the sales to the Navy would fall within the doctrine of *Public Utilities Commission v. Attleboro Co.*, 273 U.S. 83, so to preclude jurisdiction even where Congress has not acted, or on the contrary does not fall within that doctrine since Nevada has no regulatory jurisdiction over the charge made by the Navy to its tenants. If the latter, does not Part II preclude Federal Power Commission jurisdiction because of the provision in Section 201(a) that such jurisdiction shall "extend only to those matters which are not subject to regulation by the States."

Whether if the conditions to state jurisdiction vouchsafed by Section 20 of Part I are met, that circumstance also precludes Federal Power Commission jurisdiction under Part II because of the provision in Section 201(a) that such jurisdiction shall "extend only to those matters which are not subject to regulation by the States."

Whether under Part I the conditions to state jurisdiction contained in Section 20 are met, viz.,

that the states "directly concerned" have provided regulatory commissions with authority to enforce the requirements of Section 20, and such states have not been shown "unable to agree" through their properly constituted authorities.

STATUTE INVOLVED.

The pertinent provisions of the Federal Power Act (41 Stat. 1063, as amended by Title II of the Public Utility Act of 1935, 49 Stat. 838, 16 U.S.C. 791a, *et seq.*) are set out in Appendix A, *infra,* pp. 41-49.

STATEMENT.

California Electric Power Company is engaged in the business of furnishing electric energy in certain eastern portions of California and also in two counties of Nevada (R. 7).

Since July 1, 1943 the Company has been selling energy to the Navy at Mill Creek, California, pursuant to a contract for the sale of all energy required by the Government "for use of the Government's Naval Ammunition Depot, Hawthorne, Nevada" (R. 10). The Company delivers the energy in California at the 55 kv station bus at its Mill Creek, California, generating plant. From there, the Navy transmits the energy over its own 55 kv transmission line, running partly through California and partly through

Nevada, to the Naval Ammunition Depot at Hawthorne, Nevada (R. 8).

A large percentage of the energy furnished the Navy is derived from Company hydroelectric projects located in California but operated under federal license under Part I of the Federal Power Act by virtue of location on public lands or on navigable streams (R. 11). At times, however, all or a portion of the energy comes from nonlicensed sources (R. 11).

The energy purchased by the Navy is consumed wholly at the Naval Ammunition Depot at Hawthorne, Nevada, which, in addition to the installations devoted directly to Naval use, includes the quarters for naval personnel described as "public quarters" and the "Navy Low-Cost Housing Project" known as Babbitt, which provide living quarters and facilities for those civilians connected directly or indirectly with the Navy's activities on the reservation (R. 11).

About 75 per cent of the energy purchased by the Navy is used in the Depot's industrial operations; the balance is used by the individuals and business establishments located on the Government reservation (R. 28, 50). Individuals may reside or conduct business only so long as their presence is consistent with the Navy's obligations. The lease agreements with those occupying "public quarters" and with those occupying the low-cost housing project known as Babbitt, both provide that the rental privilege ceases upon termination of employment by the Navy.

For the business concessions, the Navy issues a "Revocable Permit" reciting that the concession is "for accommodation of employees of the Depot" (R. 50).

All of the Navy tenants aforementioned are charged for the energy they consume at 1.5 cents per kwh (R. 32), a figure set solely by the Navy and subject to change by the Navy from time to time (No. 495, this Term, Tr. of Record 291).

In October, 1947 California Electric Power Company applied to the California Commission for a general increase in electric rates throughout its system. Extensive hearings were conducted. Among other evidence, the revenues and expenses in connection with the sales to the Navy were considered (R. 8). On July 1, 1948 the California Commission issued its Decision No. 41798 (48 Cal. P.U.C. 183) authorizing rate increases spread equitably among the several classes of consumers in accordance with accepted practice (R. 8). It prescribed Schedule P-2 for customers of the same type and kind as the Navy, but it did not expressly name the Navy.

The question soon arose whether such rate decision should be construed to apply to sales to the Navy, and the Company filed a supplemental application with the California Commission seeking a determination on that point. In the midst of the hearings thereon, the Federal Power Commission issued an order to show cause against the Company upon the theory that it, not the California Commission, had jurisdiction over the sales to the Navy. By mutual

involved, a reading of the pertinent portions of the California Commission decision (R. 10-16) makes clear, and puts beyond any honest misunderstanding, that such decision was careful to assume that *both* Part I and Part II were relevant in determining jurisdiction. Thus, the California Commission's approach proved to be wholly in accord with the subsequent views expressed by this Court in the *Pennsylvania Water* case.

Specifically, the sales to the Navy are of energy derived partly from licensed sources. In addition, the Government argues that such sales are at wholesale in interstate commerce. Therefore, both Part I and Part II of the Federal Power Act must be examined. It will be expedient to take up Part II first, especially since the Government's brief follows that order.

Under Part II, the sales to the Navy are excluded from Federal Power Commission jurisdiction for four separate reasons:

(A) The sales are not to a "person." The wholesale sales in interstate commerce over which the Federal Power Commission is given jurisdiction under Part II are defined as sales "to any person for resale." Part II, Section 201(d). The Government admits that literally "person" as defined in the Act (Section 3(4)) does not include the Navy. To get around the difficulty, it argues at length that a literal construction would produce a result at odds with the purpose of Congress. However, far from being at

odds with the purpose and aim of Congress, the literal construction is entirely consistent. The Government's argument contains the fundamental weakness of assuming that tenants of the Navy are in the same position as members of the general public purchasing electricity from a private utility and that such tenants are in need of the same protection. Sensing such weakness, the Government shifts its ground to the proposition that it is the seller of power rather than the consumer which Congress aimed to protect and that surely Congress must have intended to give the Navy as much protection as it gave public utilities. (Gov. Brief 32.) However, the legislative history reveals that Congress was not concerned at all about the welfare of public utilities but only of ultimate consumers. Finally, the Government indulges in a specious legislative history argument designed to show that Congress did not know what it was doing when it used "person" in section 201(d). Such argument can readily be disposed of.

(B) The sales are not "for resale." The wholesale sales under Part II are defined as sales "for resale." The sales to the Navy are not "for resale" but rather for use of the Navy's Ammunition Depot. The portion of the energy not used in the industrial operations is provided to the Navy's tenants for a charge. That such furnishing of electricity to tenants is not "for resale" as Congress used such term is very apparent from the statutory history which reveals that Congress was aiming to protect members

of the general public purchasing from a utility, not tenants of a governmental agency who obviously are not in need of protection.

(C) The interstate commerce clause would not forbid California's exercise of jurisdiction over sales to the Navy because, unlike the situation in *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), there would be no potential clash of state interests. Therefore, Part II, Section 201(a), declaring that Federal Power Commission regulation shall "extend only to those matters which are not subject to regulation by the States," operates to preclude Federal Power Commission jurisdiction. The Government sidesteps this embarrassing conclusion by declaring in a footnote (Gov. Brief 20n) that the argument is irrelevant where Congress has enacted a comprehensive scheme of regulation. The Government merely begs the question.

(D) Even if the sales to the Navy were held to fall within the principle of the *Attleboro* case and by virtue of the interstate commerce clause to be outside state jurisdiction in the absence of a specific grant of authority by Congress, Congress did in fact by the Federal Water Power Act of 1920, incorporated as Part I of the Federal Power Act in 1935, confer upon the states jurisdiction over interstate sales of licensed power provided certain conditions set forth in Section 20 were met, viz., that the states directly concerned had qualified regulatory commissions and that such states were not shown unable

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(B) Even if California and Nevada are both states "directly concerned," each has "provided a commission or other authority to enforce the requirements of this section [20] within such State." Contrary to the Government's argument that Section 20 requires state commissions with compact powers, it is clear that Congress contemplated no more than a commission in each state with authority to fix just and reasonable rates "within such State." Both California and Nevada have such commissions.

(C) Even if California and Nevada are both states "directly concerned," they have not been shown unable to agree through their properly constituted authorities respecting the rates which the California Commission authorized California Electric Power Company to charge the Navy. To circumvent the effect of this admitted fact, the Government seeks to have read into Section 20 a requirement which is not there, viz., that the states must enter into affirmative agreements before they can claim jurisdiction, to the exclusion of the Federal Power Commission. Actually, Section 20 vouchsafes state jurisdiction so long as there is an absence of disagreement. Nevada upon the facts has not disagreed in any manner respecting the California Commission's authorization of rates for sales to the Navy.

The argument herein assumes that the sales in question are in interstate commerce because such assumption was made by the California Commission in reaching its decision. Furthermore, and for the same reasons, no reliance is placed on Section 201(f) of Part II. The brief of the second respondent, California Electric Power Company, deals with these matters.

ARGUMENT.

I. BOTH PART I AND PART II OF THE FEDERAL POWER ACT MUST BE CONSIDERED IN DETERMINING WHETHER JURISDICTION MAY PROPERLY BE EXERCISED BY THE CALIFORNIA COMMISSION OVER THE SALES TO THE NAVY.

This Court has now made it clear, contrary to the repeated contentions of the Federal Power Commission, that Part II, enacted in 1935, did not repeal by implication the Federal Water Power Act of 1920, incorporated as Part I of the Federal Power Act in 1935, so to place interstate wholesale sales of licensed power solely under Part II. The sales in *Pennsylvania Water Co. v. Federal Power Commission,* 343 U.S. 414 (1952), were interstate wholesale sales and therefore seemed to fall under Part II; they were also sales of licensed energy and therefore seemed to fall under Part I. This Court specifically declared the sales to be subject to both Part I and Part II. 343 U.S. at 419.

Even in the face of the *Pennsylvania Water* case, the Government continues to wage its argument of

repeal by implication. (Gov. Brief 54, 55.) Despite the clear statement that jurisdiction was given under Part I, Section 20, as well as under Part II, over the sales in question, viz., interstate sales for resale of licensed energy, the Government urges, "if the question should be reached in the present case[,] that Section 20 does not extend to interstate sales for resale and that, if this reading be incorrect, that Section 20 is *pro tanto* repealed by implication by Part II of the Act" (Gov. Brief 55n). We submit that the Government is unwarranted in treating this Court's statement respecting Part I as dictum. Furthermore, this Court has now made clear that the provisions of Part I must be accorded as much vitality as the provisions in Part II, even to the extent that seemingly overriding provisions of Part II will not be construed as "a repeal by implication of the powers over licensees that are deeply engrained in Part I of the Act and put there by Congress for the purpose of protecting the public domain." *Federal Power Commission v. Idaho Power Co.*, ... U.S. ....., 97 L. ed. (Advance p. 9, 13).

Contrary to the assertions of the Government that the California Commission came to its conclusion upon an erroneous assumption that Part I alone is to be considered when licensed power is involved (Gov. Brief 16, 53), a reading of the pertinent portions of the California Commission's decision (R. 10-16) makes clear, and puts beyond any honest misunderstanding, that such decision was careful to assume that *both* Part I and Part II were relevant in deter-

mining jurisdiction. Thus, the California Commission's approach proved to be wholly in accord with the subsequent views expressed by this Court in the *Pennsylvania Water* case. Curiously, it is the Government, not the California Commission, which is guilty of seeking to restrict inquiry to a single Part of the Federal Power Act.

The sales to the Navy are of energy derived partly from licensed sources. In addition, the Government argues that such sales are at wholesale in interstate commerce. Therefore, both Part I and Part II of the Federal Power Act must be examined. It will be expedient to take up Part II first, especially since the Government brief follows that order.

II. UNDER PART II THE SALES TO THE NAVY ARE EXCLUDED FROM FEDERAL POWER COMMISSION JURISDICTION FOR FOUR SEPARATE REASONS.

A. The sales are not to a "person."

The wholesale sales in interstate commerce over which the Federal Power Commission is given jurisdiction under Part II are defined as sales "to any person for resale." Part II, Section 201(d).

Even if it be conceded that the sales are "in interstate commerce" within the Act, they are not sales to a "person." At the very time the language of Section 201(d) was adopted, Congress also enacted in the same statute a new subsection defining the word "person." Part I, Section 3(4). The Government

admits that "person" as thus defined does not include the Navy. It proceeds to devote some twenty pages of its brief (Gov. Brief 28-47) to explain why it thinks "person" means something else in Section 201(d).

The Government does a number of things to escape the literal meaning of "person" as used in Section 201(d) and as defined in Section 3(4):

(1) Respecting the legislative history, it indulges in an intricate, ill-conceived argument, remarkable only for its ingeniousness (Gov. Brief 40, 41, 43). The Government elaborately argues that the section defining "person", Section 3(4), which appeared in the original bills before Congress in 1935 (S. 1725, H.R. 5423, 74th Cong., 1st Sess.) must not be construed to extend to Section 201(d) because the language of Section 201(d) as finally enacted and containing the word "person" did not appear in those original bills but, on the contrary, was inserted later on in the session and that, in any case, Congress, when it did insert the language containing the word "person" in Section 201(d), was not thinking about the definition of the word "person" found in Section 3(4) of the bill because it was only aiming "to close an obvious loophole in another aspect." Such reasoning not only imputes to Congress notable carelessness in draftsmanship but defies the canon of construction that "an omission at the time of enactment, whether careless or calculated, cannot be judicially supplied."[2]

[2]Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Col. L. Rev. 527, 534.

We submit that the legislative history leaves no mistake that "person" as defined in Section 3(4) was meant by Congress to have the same meaning throughout the Act, including Section 201(d).[3] Not only had "person" not been defined at all in the Federal Water Power Act of 1920, but, when the word was defined for the first time in 1935, the Solicitor of the Federal Power Commission, one of the chief draftsmen for the new legislation, expressly stated, "We also used the word 'person' because in the drafting of the act, *and particularly in the new part of the act,* you could use the word 'person' with brevity and it made simplification for drafting" (emphasis added). *Hearings before Committee on Interstate and Foreign Commerce on H.R. 5423,* 74th Cong., 1st Sess. 460 (1935).

Furthermore, while the origial bill offered in the House (H.R. 5423, 74th Cong., 1st Sess.) contained language restricting the effect of the definition section, such restriction was left out in the final act. The original proposal was that Section 3 should start, "For the purposes of this Act, *unless the context otherwise requires* . . ." (emphasis added). When questioned about the situations where the context *would* otherwise require, the Solicitor for the Federal Power Commission said he would study the matter and report back. He subsequently reported that there

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[3]That the Government recognizes the dangerous ground on which it treads is manifested by its "caveat" (Gov. Brief 38, 39) that "We do not suggest that either the United States or municipalities are 'persons' or 'corporations' for all purposes under the Federal Power Act."

were no situations where the context would "otherwise require." *Hearings before Committee on Interstate and Foreign Commerce on H.R. 5423*, 74th Cong., 1st Sess. 459, 460, 485. The clause "unless the context otherwise requires" was significantly omitted from the Act as passed.

We recognize that the Government will be quick to apply to the above facts in the legislative history the same kind of intricate argument as that earlier alluded to and will contend that statements made by the Solicitor must not be given weight because "person" was inserted in Section 201(d) only toward the close of the session. Again, such argument would improperly impute to Congress reprehensible carelessness in draftsmanship.

(2) The Government next indulges in a policy argument designed to show that, regardless of the literal meaning of Section 201(d), Congress did not mean to exclude the sales to the Navy. (Gov. Brief 31-40). The Government very properly observes that a literal construction of a statute must give way if the result would be plainly at variance with the policy of the legislation as a whole. It develops this thesis with erudition and a wealth of citation.

We submit, however, that not only does the legislative history forbid "person" to be construed as one thing in Section 201(d) and something else in the rest of the Act, but that the aims and policies of Congress are fully carried out by giving "person" in Section 201(d) the meaning which Congress has declared it is to have "for purposes of this act" in Section 3(4).

The hearings before the respective committees of Congress, the reports of those committees and the words on the floor of Congress are replete with expresions of the aim of Congress to fill the gap in state regulation revealed in *Public Utilities Commission v. Attleboro Co.*, 273 U.S. 83, and thereby to protect those members of the general public from excessive rates who are ultimate consumers purchasing electricity from a public utility which, in turn, purchases the energy at wholesale in interstate commerce. E.g., *Hearings before Committee on Interstate and Foreign Commerce on H.R. 5423*, 74th Cong., 1st Sess. 497 (1935); *Hearings before Committee on Interstate Commerce on S. 1725*, 74th Cong., 1st Sess. 250 (1935); Sen. Rep. No. 621, 74th Cong., 1st Sess. 48, 49 (1935); H.R. Rep. No. 1318, 74th Cong., 1st Sess. 7, 8 (1935). Such purpose has been frequently noted by this Court. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 610; *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 514-521; *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*, 341 U.S. 329, 335-336.

Tenants of the Navy are not in the same position as members of the general public who are ultimate consumers purchasing electricity from a public utility which, in turn, purchases the energy at wholesale in interstate commerce. The difference in position is very real. The Government attempts to obfuscate it by a hurried shift to the specious ground that Congress intended to protect public utilities and the Fed-

eral Government alike in selling to ultimate consumers. (Gov. Brief 32.) Certainly, Congress was not concerned with protecting public utilities when it enacted the Federal Power Act.

The vital difference between tenants of the Navy and those members of the public whom Congress *did* intend to protect is that Navy tenants are not in need of protection. There is a close similarity of interest between the Navy and its tenants. The Navy itself is in an entirely different category from a public utility engaged in the business of selling to ultimate consumers. Unlike public utilities which might be willing, and, indeed, have shown themselves willing in the past, to purchase wholesale power in interstate commerce at exorbitant costs so long as they could pass such costs on to ultimate consumers, the Navy has the public duty of entering into electric purchase contracts only if they are consistent with its obligations as a branch of the military service and of the Government. It may be presumed that the Navy can take care of itself in that regard without the help of another federal agency. Furthermore, the Navy in providing service to its tenants is not engaged in a business for profit. It follows that in the case of tenants of the Navy the very factors are absent which motivated the Congressional policy given expression in the Federal Power Act.

Admittedly, as the Government points out, the committee reports of Congress (Sen. Rep. No. 621, H.R. Rep. No. 1318, H.R. Rep. No. 1903, 74th Cong., 1st

Sess.) speak in general terms about wholesale sales in interstate commerce without reference to the identity of the purchaser, as being the sales meant to be covered by Part II, but surely the Government would have to agree that such general language must be understood in its context which expressly dealt with the *Attleboro* situation, to repeat, a situation where protection is needed for members of the general public who are ultimate consumers purchasing electricity from a public utility[4] which, in turn, purchases the energy at wholesale in interstate commerce. The transcripts of Congressional committee hearings, the reports of those committees and the record of the comments on the floor of Congress in 1935 in connection with the Federal Power Act can all be searched in vain for any reference to the kind of sales here in issue. Clearly, the instant case is, as the Government puts it, a situation unforeseen. Therefore, the Government is not entitled to rely upon the broad language in committee reports as proving that Congress meant to cover a situation to which it had given no thought.

Finally, it should be noted that, while the Government has had success before three federal courts in its position that the identity of the purchaser of wholesale power is immaterial (*California Electric*

[4]Even private individuals or organizations in providing electric service to their tenants have by the great weight of authority been held to be not engaged in the business of public utility service. E. g., *Story v. Richardson*, 186 Cal. 162, 198 Pac. 1057 (1921); *Jonas v. Swetland*, 119 Ohio St. 12, 162 N.E. 45, PUR 1928D 825 (1928); *In Re Fulton*, PUR 1930D 11 (Mo. 1930).

Power Co. v. Federal Power Commission, 9th Cir., No. 12987 (1952); *Wisconsin-Michigan Power Co. v. Federal Power Commission*, 197 F. 2d 472 (7th Cir.); *Wisconsin, et al. v. Federal Power Commission* and *Wisconsin Power and Light Co. v. Federal Power Commission*, D.C. Cir. Nos. 11224, 11225), no consideration was given by those courts to the fact that, while there is need for protection in the case of an ultimate consumer who buys from a public utility, there is no such need in the case of an ultimate consumer who is a tenant of the Navy and is furnished electric service by the Navy. The policy of Congress as manifested in the Federal Power Act obviously does not extend to this latter situation.

B. The sales are not "for resale."

The wholesale sales covered by Part II are defined as sales "for resale." Section 201(d). The sales to the Navy are not "for resale" in the sense in which that term is used in Part II.

The sales are "for use of the Government's Naval Ammunition Depot." All of the energy is used in fact on such Depot. The greater part of it is used in the Depot's industrial operations. The balance is furnished only to tenants at sufferance at the Depot, tenants whose presence is permitted only so long as the Navy needs them.

While it is true that the tenants are charged so much per kilowatt hour for actual use, this is a legitimate occasion for the operation of that principle of statutory construction for which the Government

eloquently contends elsewhere, viz., that the literal meaning of words must be tempered by consideration of the policies and aims of the statute. Again, it is only necessary to refer to the historical fact that in enacting Part II Congress sought to deal with the *Attleboro* situation where one utility sells to another utility for resale by the latter to ultimate consumers, to conclude that Congress in using the phrase "for resale" meant it to apply only under similar circumstances. Clearly, Congress was aiming at the situation where the reseller is engaged in public utility service and the ultimate consumers are in need of protection, not to the situation where the reseller is merely providing service to its tenants. Again, it must be noted that there is a similarity of interest between the Navy and its tenants and consequently an absence of that need for protection which moved Congress to enact Part II.

In this phase of its argument the Government again seeks to derive comfort from general statements in the cases and Congressional reports describing the gap in the *Attleboro* case, as supporting its claim that the identity of the reseller is immaterial. (Gov. Brief 48-51.) The Government must recognize, however, that such general statements to be properly understood must be related to their context.

C. The interstate commerce clause would not forbid California's exercise of jurisdiction over the sales to the Navy. Therefore, Part II, Section 201(a), declaring that Federal Power Commission regulation shall "extend only to those matters which are not subject to regulation by the States," operates to preclude Federal Power Commission jurisdiction.

If it be assumed that the sales to the Navy are in interstate commerce, regulation of such sales by California would, nevertheless, not be precluded under the holding of *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927). That decision was based upon the proposition that the interstate commerce clause forbids state jurisdiction where a potential clash of state interests would arise from its exercise. It was there held that a state cannot regulate the rates charged by a local electric utility for current sold to a foreign electric utility for resale in another state and delivered at the state boundary, inasmuch as state regulation would constitute a direct burden upon interstate commerce, placing a direct restraint upon that which, in the absence of federal regulation, should be free. In the case of the sales to the Navy, there can be no potential clash of state interests. Nevada has no jurisdiction, nor could it have, over the Navy, either as to the rates the Navy pays to California Electric Power Company or as to the rates the Navy charges its tenants. Therefore, Nevada cannot be said to have a state interest respecting the sales in question which could potentially clash with the interests of California. The principle of *Pennsylvania Gas Co. v. Public Service Commission*, 252 U.S. 23 (1920), while not involving

sales for resale, is applicable. There, a Pennsylvania company transmitted gas from Pennsylvania into New York and sold it directly to New York consumers. Such sales, even though in interstate commerce, were held to be local in character because no potential clash of state interests was involved and, therefore, subject to state control in the absence of supervening Congressional action.

If the foregoing interpretation is correct that the interstate commerce clause does not of itself forbid exercise by California of jurisdiction over the sales to the Navy, it follows that the language of Section 201(a) operates to preclude Federal Power Commission jurisdiction, for the words "extend only to those matters which are not subject to regulation by the States" were avowedly inserted in that section to guarantee that whatever jurisdiction states had over sales of electric energy prior to the enactment of the Federal Power Act would not be taken away. Sen. Rep. No. 621, 74th Cong., 1st Sess. 18 (1935). As Dozier A. DeVane, Solicitor for the Federal Power Commission, put it in hearings before the Senate Committee on Interstate Commerce (*Hearings before Committee on Interstate Commerce on S. 1725,* 74th Cong., 1st Sess. 247), "It cannot be too strongly emphasized that the rate-making power conferred upon the [Federal] Commission . . . is limited to the field in which the States have no constitutional authority."

D. Even if the sales to the Navy were held to fall within the principle of the Attleboro case and by virtue of the interstate commerce clause to be outside state jurisdiction in the absence of a specific grant of authority by Congress, Congress did in fact by the Federal Water Power Act of 1920, incorporated as Part I of the Federal Power Act in 1935, confer upon the states jurisdiction over interstate sales of licensed power provided certain conditions were met, viz., that the states directly concerned had qualified regulatory commissions and that such states were not shown unable to agree respecting the rates in question. Part I, Section 20. It follows that, whenever upon the facts of a given case the conditions to state jurisdiction provided in Section 20 are met, Section 201(a) operates to preclude Federal Power Commission jurisdiction under Part II, inasmuch as Section 201(a) declares that Federal Power Commission jurisdiction shall "extend only to those matters which are not subject to regulation by the States."

This conclusion in the first place follows the natural meaning of the phrase "extend only to those matters which *are not subject to regulation by the States.*" (Sec. 201(a). Emphasis added.) The phrase contains no limitation. It says that, whenever the states have jurisdiction, regardless of the source of that jurisdiction, authority is withheld from the Federal Power Commission. The states may have jurisdiction because the interstate commerce clause does not forbid it. We have already pointed out in Item C. above that we believe that to be the correct interpretation of the interstate commerce clause as applied to the sales to the Navy. Or the states may have jurisdiction because, while falling under the ban of the interstate commerce clause, Congress has, nevertheless, conferred jurisdiction upon them, as it has power to do. See *Southern Pacific Co. v. Arizona*, 325 U.S. 761

(1944). That is precisely what Congress has done in Section 20 of Part I where interstate sales of power by a licensee are involved and the conditions to state jurisdiction set forth in that section are met.

Such literal construction of the phrase "extend only to those matters which are not subject to regulation by the States" is wholly in keeping with the legislative history and the aim of Congress. The committee hearings, the committee reports and the words on the floor of Congress pertaining to Part II are all replete with statements that Part II was designed to fill the gap in regulation revealed by the *Attleboro* decision, *but to do no more,* ensuring to the states whatever authority they were already able to exercise, regardless of the source of that authority. The phrase in question was used with the express purpose of guaranteeing to the states *all* of their previously possessed authority, even that given them by the Federal Water Power Act of 1920 which was incorporated as Part I of the Federal Power Act. It is often forgotten that the Federal Water Power Act of 1920 was in effect when the *Attleboro* decision came down in 1927 but was not involved in that case because the energy in question came from non-licensed sources. Surely, no one can doubt that, if licensed power had been involved, the sales would have been "subject to regulation by the States" assuming the conditions of Section 20 could be met.

The foregoing construction of the phrase "extend only to those matters which are not subject to regu-

to the Federal Power Commission. 179 F. 2d 179; 189-193.

We submit that, had Congress, when it first used the language of Section 20 in the Federal Water Power Act of 1920, meant to encompass within its terms only state regulatory bodies having compact powers, it would have done so in direct terms. The unusual grant of compact authority is not lightly to be presumed as having been conferred by indirection, especially since the policy of Congress expressed in Section 20 can be effectuated without any such interpolation. The policy was to ensure that "the rates . . . and the services . . . by any licensee . . . or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable."[5] The state where the licensed power is first sold can ensure the reasonableness of the rate by having a commission with authority to fix the wholesale rate. California has admitted power not only over retail but wholesale rates of utilities operating within the state.[6] The state where the licensed power is ulti-

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[5]The Government has deliberately omitted from its Appendix A quotation of Section 20 (Gov. Brief 75) the pertinent language: "or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service."

[6]California Public Utilities Code (Cal. Stats. 1951, ch. 764) provides in Section 216(a): "When any person or corporation performs any service or delivers any commodity to any person, private corporation, municipality or other political subdivision of the State, which in turn either directly or indirectly, mediately or immediately, performs such service or delivers such commodity to or for the public or some portion thereof, such person or corporation is a public utility subject to the jurisdiction, control, and regulation of the commission and the provisions of this part."

mately consumed can ensure the reasonableness of "the rates . . . by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service" if it provides a commission with authority to fix such rates[7] and if it is given the indirect control over the wholesale rate vouchsafed by Section 20, viz., the power to have jurisdiction over that rate automatically transferred to the Federal Power Commission merely by stating its disagreement with such rate. That was in fact the manner by which Federal Power Commission jurisdiction was obtained in the *Second Safe Harbor Case*, and no one can deny that the consumers in Maryland, the state of ultimate consumption, were thereby protected.

C. Even if California and Nevada are assumed both to be states directly concerned, they have not been shown "unable to agree through their properly constituted authorities" respecting the rates which the California Commission authorized California Electric Power Company to charge the Navy.

The Government no doubt concedes that this is true upon the facts. Therefore, it reads into Section 20 a requirement that states directly concerned must affirmatively agree upon a given rate in order to obtain jurisdiction over interstate sales by licensees. (Gov. Brief 62.) However, as we have already shown, Sec-

[7]The Nevada Public Service Commission has jurisdiction over the rates for sale to ultimate consumers in Nevada. Hillyer's Complied Nevada Laws, 1929, Section 6116. The Government points out that the Nevada Public Service Commission has no authority over wholesalers of electric power in Nevada (Gov. Brief 59n), but that circumstance is immaterial upon the facts, the wholesale sales, if they be so considered, having occurred not in Nevada but in California.

tion 20 does not envisage state commissions with compact powers, nor any complicated machinery before Federal Power Commission jurisdiction may be invoked. The section envisages state commissions of the usual kind with local, not extraterritorial powers, and a mere inability by the state of consumption to agree with the wholesale rate imposed by the other state is sufficient to invoke Federal Power Commission jurisdiction. As already noted, Federal Power Commission jurisdiction was invoked by this simple means in the *Second Safe Harbor Case*. No complicated compact machinery was contemplated by Congress, nor was any needed to effectuate its policy.

CONCLUSION.

The foregoing analysis clearly demonstrates that in the instant case neither Part I nor Part II conferred jurisdiction upon the Federal Power Commission. Such analysis further demonstrates that the California Commission is not precluded from exercising jurisdiction either by the interstate commerce clause or Part II, and that Part I did authorize the California Commission to exercise jurisdiction.

This is a case where the eloquent admonition of Mr. Justice Frankfurter is particularly applicable:

> "The underlying assumptions of our dual form of government and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits, cut across what might otherwise be the implied range of

legislation. The history of congressional legislation regulating not only interstate commerce as such but also activities intertwined with it, justify the generalization that, when the Federal Government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that restrospective expansion of meaning which properly deserves the stigma of judicial legislation."[8]

It is respectfully submitted that the order of the Supreme Court of the State of California, affirming the order of the California Commission, should be affirmed.

Dated, San Francisco, California,
January 2, 1953.

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[8]Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Col. L. Rev. 527, 540.

(Appendix A Follows.)

Appendix A

Appendix A

The pertinent provisions of the Federal Power Act (Title II of the Public Utility Act of 1935, c. 687, 49 Stat. 838, 16 U.S.C. 791a. *et seq.*) are as follows:

SEC. 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit:

* * * * * * *

(3) "corporation" means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include "municipalities" as hereinafter defined;

(4) "person" means an individual or a corporation;

* * * * * * *

(7) "municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;

* * * * * * *

SEC. 19. That as a condition of the license, every licensee hereunder which is a public-service corporation, or a person, association, or corporation owning or operating any project and developing, transmitting, or distributing power for sale or use in public service, shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates

lation by the States" has the great merit of making it possible to reconcile the jurisdictional provisions of Parts I and II under all circumstances. The problem of jurisdiction in *Pennsylvania Water Co. v. Federal Power Commission*, 343 U.S. 414 (1952), happened to be easy because Part I and Part II taken separately both produced the same result that jurisdiction vested in the federal agency. But, suppose the states had *not* been shown "unable to agree." Then Part I, Section 20, standing alone would have operated to vest jurisdiction in the states and Part II standing alone and without reference to the language in Section 201(a) would have operated to vest jurisdiction in the Federal Power Commission. However, by giving Section 201(a) the vitality which Congress meant it to have, the conflict is resolved. The sales would be "subject to regulation by the States" because of Part I, Section 20; therefore, Section 201(a) would operate to deny jurisdiction to the Federal Power Commission under Part II.

Upon the facts in the instant case, the conditions to state jurisdiction set forth in Part I, Section 20, are in fact met, as shown in the following section of this brief.

Before leaving the discussion of Part II, it should be noted that, even if all of the four reasons set forth above for denying Federal Power Commission jurisdiction were rejected, the Federal Power Commission still could not obtain jurisdiction under Part II over the entire purchases by the Navy. The energy sold

to the tenants is only a portion of the energy purchased, and a portion which can be readily calculated inasmuch as each Navy tenant is separately metered (R. 32). The jurisdiction of the Federal Power Commission, therefore, under the principle of *Colorado Interstate Gas. Co. v. Federal Power Commission*, 185 F. 2d 357 (3d Cir., 1950) would extend only to the portion of the energy furnished such tenants. The situation is clearly different from that in *Pennsylvania Water Co. v. Federal Power Commission*, 343 U. S. 414 (1952) because there the "jurisdictional" part of the sales was not distinguishable from the "nonjurisdictional" part.

III. UNDER PART I, DEALING WITH SALES OF ENERGY BY LICENSEES OF FEDERAL POWER PROJECTS, THE CALIFORNIA COMMISSION HAS JURISDICTION OVER THE SALES TO THE NAVY BECAUSE ALL OF THE CONDITIONS TO STATE JURISDICTION SET FORTH IN SECTION 20 ARE MET.

Assuming that the sales to the Navy are in interstate commerce, then, under Section 20, Congress has conferred jurisdiction upon the Federal Power Commission only if: (a) "any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section [20] within such State" and (b) even though the requisite state commissions or other authorities have been provided, only if the states "directly concerned" are "unable to agree" on the service or rates through their properly constituted authorities.

A. California is the only state "directly concerned."

The Government would concede that California is "directly concerned" because the Company operates as a public utility in California and consummates the sales to the Navy in California. The effect of the revenues and expenses in connection with the sales by the Company to the Navy has a direct influence upon the rates which the California Commission may authorize the Company to charge for intrastate wholesale and retail sales to consumers within California. California's direct concern does not, of course, arise by virtue of any effect which the regulation of rates of the Company might have upon the Navy or upon the Navy's tenants. California has no regulatory power over the Navy or its tenants, either within or outside California, for as the Government points out (Gov. Brief p. 57), the doctrine of intergovernmental immunity applies.

Nevada, on the contrary, is not "directly concerned." Since as the Government puts it, the doctrine of intergovernmental immunity applies with an even hand, Nevada has no regulatory power over the Navy or its tenants, either within or outside Nevada. Thus the fact that the energy is consumed within a Naval reservation in Nevada gives Nevada no more concern than such circumstance would give to Maine or Florida, obviously not a "direct concern." Furthermore, there is no basis for "direct concern" to Nevada over the sales in question corresponding to that by which California derives its "direct concern." The Government argues (Gov. Brief 57, 58)

that Nevada is "directly concerned" because the Company *does* make some sales of electric energy in Nevada and, therefore, the costs of furnishing energy to the Navy and the revenue derived therefrom concern Nevada because of the over-all effect upon the rates to Nevada consumers. That argument, however, ignores the fact that Nevada may regulate the rates to Nevada consumers solely by reference to the Company's Nevada rather than its company-wide operations, the determination of a reasonable return being based solely upon that part of the Company's property devoted to public use for Nevada and upon the expenses and revenues allocable to Nevada. The revenues and expenses in connection with the sales to the Navy are thus excluded and give Nevada no "direct concern."

It follows that Section 20 contemplates the situation where the direct concern of one state arises from consummation of particular sales of licensed energy in that state and the direct concern of the other state arises from *jurisdiction over the rate charged the ultimate consumer of the energy derived from such sales.* This construction is further given support from the use of the words "within such State" in the phrase "whenever any of the states directly concerned has not provided a commission or other authority to enforce the requirements of this section *within such State.*" (Emphasis added.)

Since California is the only state "directly concerned," no further inquiry need be made respecting the requirements of Section 20 to ensure California's jurisdiction, because California has provided a com-

mission with authority to enforce the requirements of the section, i.e., as we shall demonstrate, a commission with authority over the rates of utilities "within such State." No question of inability of California and Nevada to agree on the rate prescribed by California for the sales by the Company to the Navy can arise.

B. Even if California and Nevada are both states "directly concerned," each has "provided a commission or other authority to enforce the requirements of this section [20] within such State."

The California Public Utilities Commission is vested by the California Constitution, article XII, section 23, and by the Public Utilities Act (Public Utilities Code, Sections 451, 453, 454, (Cal. Stats. 1951, ch. 764)) with broad regulatory powers over the rates of public utility electric companies operating within the state.

Similarly, the Nevada Public Service Commission is vested with authority to regulate the rates of public utility electric companies providing service to ultimate consumers in Nevada. Hillyer's Compiled Nevada Laws, 1929, Sections 6100-6140.

We submit that such state commission regulatory control is all that Section 20 contemplates when it speaks of "a commission or other authority to enforce the requirements of this section within such State." The context reveals that the "requirements of this section" are that "the rates . . . and the services . . . by any . . . licensee . . . or by any person, corporation, or association purchasing power from such licensee

for sale and distribution or use in public service shall be reasonable . . . to the customer." The section contemplates state commissions of the usual kind with authority to fix rates within their own respective states. This is evident from the quoted language which contemplates that one state shall have regulatory power over the licensee and the other state regulatory power over the purchaser from the licensee. It is further evident from use of the phrase "the requirements of this section within such state."

To counter the foregoing conclusion, the Government simply reads into Section 20 what is not there. It declares that to qualify under Section 20 a state commission must have affirmative power to agree on a rate fixed in another state. (Gov. Brief 58-62.) It refers to the *First* and *Second Safe Harbor Cases (Safe Harbor W.P. Corp. v. Federal Power Commission,* 124 F. 2d 800 (3d Cir.), certiorari denied, 316 U.S. 663; *Safe Harbor W.P. Corp. v. Federal Power Commission,* 179 F. 2d 179 (3d Cir.), ceriorari denied, 339 U.S. 957) which did in fact involve state commissions with power to enter into agreements with other state commissions. While it is true that in the *Second Safe Harbor Case* the court indicated a belief that Section 20 contemplated state commissions with compact powers, the fact remains that no affirmative action between the two state commissions took place and yet the court declared they had been shown "unable to agree" under the terms of Section 20, by virtue of certain correspondence by one of the commissions, directed not to the other commission but